IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID CUTTER and JILLIAN CUTTER, husband and wife,	)	No. 63411-9-I (consolidated with No. 64082-8-I)
Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
ALEXANDER MCLAREN,	)	
Appellant.	)	FILED: July 26, 2010

Grosse, J. — Alexander McLaren failed to comply with a court order to move a house from his property. Without notice to or permission from the court, McLaren sold the house to a third party and then claimed an inability to perform as a defense to the trial court's contempt finding. But an inability to perform is no defense to contempt proceedings when the contemnor voluntarily creates the alleged hardship in response to the court's order. We also reject McLaren's other challenges to the trial court's contempt findings and affirm.

FACTS

In November 2004, David and Jillian Cutter entered into an agreement to purchase a vacant lot in Anacortes from Alexander McLaren. An addendum to the agreement obligated McLaren to remove an existing "[o]ld white house" from a nearby lot that McLaren owned. When McLaren refused to close the sale and relisted the property at a higher price, the Cutters sued for specific performance and damages.

After a bench trial, the trial court concluded that McLaren was solely

responsible for the failure to close and ordered specific performance. The court also awarded damages and attorney fees and ordered McLaren to remove the white house by September 25, 2006. McLaren appealed the trial court's judgment, but did not stay enforcement of the decision. This court affirmed the trial court's decision in its entirety, including the remedy of specific enforcement.[1]

On October 23, 2006, after McLaren failed to remove the white house by the deadline, the Cutters moved for an order of contempt. McLaren filed a declaration alleging that he had not received adequate notice of the contempt motion. He further alleged that he had attempted to comply with the order, but needed more time, in part because of the historic significance of the house. McLaren also informed the court that he had sold the house on September 4, 2006, to Thomas Hsueh, "who has not had time to remove it due to his travel abroad." In a declaration, Hsueh asked for additional time to move the house.

At the hearing on November 15, 2006, McLaren advised the trial court that "[he had] taken all of the fundamental steps [he] can take," asserting that he had applied for a permit to move the house, that he had requested a bid from a moving company, and that he had contacted the owner of the new site for the house. McLaren did not allege any inability to comply with the court's order.

The court found that McLaren had failed to remove the white house "[w]ithout valid legal excuse" in direct violation of the court's order and that he was therefore in

[1] See Cutter v. McLaren, noted at 143 Wn. App. 1008, review denied, 164 Wn.2d 1018 (2008).

contempt. The court awarded attorney fees to the Cutters but did not impose immediate sanctions. The court directed McLaren to remove the house within 75 days of the order or pay the Cutters remedial sanctions of $250 per day until the house was removed.

On May 8, 2008, the Cutters filed a second motion for contempt, alleging that McLaren had still not complied with the court's order to remove the white house. McLaren did not file a written response to the motion, but attorney Richard Hughes made a limited appearance on McLaren's behalf at the hearing on June 13, 2008. Hughes informed the court that McLaren had not moved the house because he had chosen to seek discretionary review of the Court of Appeals decision in the Washington Supreme Court:

> You know, there's a good reason why this house has not been relocated; it's because he's pursuing his appellate rights. And the terms that are in place are fairly substantial as is, $250 a day and counting, and I think he gets that. I certainly get that.
>
> The point now is whether or not an additional term above that is necessary or appropriate, and frankly I don't think it is because he's going to – you know, he's going to follow his course and see what he can do, you know, in his last stage of appeal. It may very well be nothing, in which case he's going to be left to pay the piper, as it were . . . .

The trial court found that McLaren remained in contempt for failing to remove the white house without lawful excuse. The court ordered that the daily remedial sanction would be increased to $350 if McLaren failed to remove the house within 60 days after the Washington Supreme Court either denied McLaren's petition for

review or affirmed the Court of Appeals decision.

The Washington Supreme Court denied McLaren's petition for review on September 8, 2008. On February 13, 2009, the Cutters filed a third motion for contempt. On March 20, 2009, the trial court entered an order finding that McLaren remained in contempt for failing to move the white house and continuing the existing sanctions. Under the terms of the order, the Cutters agreed to stay all enforcement actions pending the outcome of the current appeal.

ANALYSIS

On appeal, McLaren contends that all three contempt orders and related rulings must be reversed because (1) he lacked the ability to comply with the order to move the white house; (2) the trial court failed to enter sufficient findings to support the contempt orders; and (3) the trial court failed to provide an adequate purge clause. We disagree.

Contempt of court includes the intentional disobedience of any lawful judgment.[2] If the court finds "that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court" and impose remedial sanctions, including monetary forfeitures.[3] We review contempt findings for an abuse of discretion.[4]

McLaren's primary contention on appeal is that he lacked both the legal and

[2] RCW 7.21.010(1)(b).
[3] RCW 7.21.030(2)(b).
[4] Moreman v. Butcher, 126 Wn.2d 36, 40-41, 891 P.2d 725 (1995).

factual ability to comply with the trial court's orders and that the contempt finding was therefore improper. He argues that he did not violate the court order when he sold the white house and that once he sold the house, he "was legally unable to move a house that he no longer possessed."

Because the law presumes an individual is capable of performing the actions required under a court order, the inability to comply with the order is an affirmative defense.[5] The party challenging a finding of contempt has the burden to show his or her inability to comply with the court order.[6] "The contemnor must offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible."[7]

While it is true that an inability to comply with an order is a defense to a contempt proceeding, a party cannot rely on this defense where, as here, the inability to comply is the result of the contemnor's own fault.[8] Although McLaren did not violate a specific provision of the trial court's order when he sold the white house, he has not cited any authority suggesting that he can unilaterally shed his obligation to comply with the judgment simply by transferring the white house, without court approval, to a third party. "The law will not allow such an easy way out of obligations imposed by a court on any party or person."[9]

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[5] In re Pers. Restraint of King, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988).
[6] King, 110 Wn.2d at 804.
[7] King, 110 Wn.2d at 804.
[8] 15 Karl B. Tegland, Washington Practice: Civil Procedure § 43:21, at 227-28 (2d ed. 2009).
[9] In re Power Recovery Systems, Inc., 950 F.2d 798, 804 (1st Cir. 1991)

McLaren's' claim that he was financially unable to comply with the court's order is equally unavailing. At one point, McLaren claimed that he was forced to sell the house because the underlying judgment "drained [him] of the funds required to move it." But McLaren submitted no evidence to support this conclusory allegation.

McLaren's self-created hardship and unsupported allegations of financial difficulty were insufficient to satisfy his burden of demonstrating an ability to comply with the court's order.

In a related contention, McLaren alleges that the contempt orders are defective because they lack an express finding that he had the ability to perform. The finding of a current ability to perform is a threshold requirement of a contempt finding under RCW 7.21.030(2).[1]

Significantly, in response to the first two contempt motions, McLaren never alleged that he lacked the current ability to perform. At the November 15, 2006 hearing, even though he claimed to have sold the white house, McLaren represented that he had the ability to comply and informed the court that he had taken all necessary steps to move the house. As the trial court found, McLaren only sought additional time in which to complete the move. But contrary to McLaren's assertion, the trial court's agreement to provide additional time to comply before imposing monetary sanctions does not undermine the contempt finding because McLaren

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(contemnor's claim that he sold equipment and was no longer the legal owner was no defense to contempt for failure to comply with court order to remove equipment).

[1] Britannia Holdings Ltd. v. Greer, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005).

offered no meaningful excuse for his failure to comply with the trial court's original order by the September 25, 2006 deadline.

At the hearing on the second contempt motion, McLaren's counsel informed the court that the sole reason McLaren had not complied was his calculated decision to pursue review of the underlying judgment. McLaren presented no oral or written claim that he was unable to comply.

Under the circumstances, the evidence was essentially undisputed that McLaren had the ability to comply with the court order. The record is therefore sufficient to support the trial court's contempt findings.[11] McLaren has failed to demonstrate any abuse of discretion.

McLaren next contends that the contempt orders must be reversed because they contained an insufficient purge clause. He argues that he must be allowed "an additional opportunity to comply with the Court's order to 'move the house' prior to being found in contempt."

But McLaren cites no relevant authority to support this proposition, which directly conflicts with the statutory definition of contempt.[12] Having intentionally disobeyed a court order as specified in RCW 7.21.010(1)(b), McLaren was in contempt. By its plain terms, RCW 7.21.030 then authorized the trial court to impose

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[11] See In re Guardianship of Wells, 150 Wn. App. 491, 501-02, 208 P.3d 1126 (2009).

[12] McLaren's arguments rest on dicta in State ex rel. Schafer v. Bloomer, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999), and In re Rebecca K., 101 Wn. App. 309, 314, 317, 2 P.3d 501 (2000). Moreover, both cases discussed purge clauses in the context of actual or threatened incarceration and therefore have no application here.

remedial sanctions, including monetary forfeitures, to ensure compliance with a prior court order.[13] The court was not required to provide McLaren with a second opportunity to disobey the court order before finding him in contempt.

McLaren's additional challenges to the purge clause rest on the erroneous assumption that the court was required to recognize his legal inability to comply having once sold the house. But for the reasons set forth above, McLaren's claim of an inability to comply based on his sale of the house is meritless. Under the circumstances, including his own representations to the court at the November 15, 2006 hearing, McLaren has failed to demonstrate any deficiency in the court's purge clause, which essentially granted McLaren's request by providing 75 additional days in which to comply before imposing monetary sanctions.[14]

Finally, McLaren's challenge to the trial court's order enjoining him from selling his remaining property rests solely on the assumption that the trial court abused its discretion in finding him in contempt. Because we find no abuse of discretion, this claim fails.

The Cutters have requested attorney fees on appeal, based on RCW 7.21.030(3) and the terms of the purchase agreement. The request is granted

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[13] RCW 7.21.030(2)(c).

[14] For the first time in response to the third motion for contempt, McLaren argued that he could not comply with the court's order because he had sold the property. But this claim fails as a defense to the contempt proceeding, and McLaren did not demonstrate any other circumstances that prevented him from complying with the court order. Accordingly, McLaren has not demonstrated that the trial court abused its discretion in entering the third order of contempt.

subject to compliance with RAP 18.1(d).

Affirmed.

Grosse, J.

WE CONCUR:

Dwyer, C.J. Leach, A.C.J.